



STATE OF WASHINGTON

STATE BUILDING CODE COUNCIL

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MINUTES SPECIAL MEETING WASHINGTON STATE BUILDING CODE COUNCIL

Date: June 11, 2010
Time: 1:00 p.m.
Location: Shoreline City Hall, City Council Chambers

Council Members Present: John Cochran, Council Chair; Ray Allshouse; Rod Bault; John Chelminiak; Kristyn Clayton; David DeWitte; Mari Hamasaki; Angie Homola; Robert Koch; Mark Kulaas; Jerry Mueller; David Peden; Tien Peng; Dale Wentworth; Rep. Timm Ormsby

Council Members Absent: Dave Kokot

Visitors Present: Kim Drury, Maureen Traxler, Dave Edgar, Chuck Murray, Paul O'Connor, Margie Dillon, Eric Lohnes, Kate Tate, Diane Glenn, Dave Long, Randy Stiles, Daimon Doyle, Collin Smith, Dave Hawkes, Kraig Stevenson, Garrett Huffman, Steve Wilcox, David Perkins, Jim Tinner

Staff Present: Tim Nogler, Krista Braaksma, Joanne McCaughan, Peggy Bryden

Attorney Generals Office Staff Present: Sandra Adix, Mary Ellen Combo, Ann Essko

CALL TO ORDER

John Cochran, Chair of the Building Code Council, called the meeting to order at 1:00 p.m. Everyone was welcomed and introductions were made.

REVIEW AND APPROVED AGENDA

John noted that this is a special meeting and there will be no public comment. He cautioned Council members to be careful to not reveal any attorney-client privileged information.

The agenda was approved as written.

DISCUSSION OF LITIGATION, GOVERNOR'S REQUEST FOR DELAY

Tim provided some background information on the letter from the Governor requesting a delay in the effective date of the Energy Code. This is a Council decision, not the Governor's. It is under the rulemaking authority of this Council to take this action. As of today, in order to be effective by July 1, the Council would need to enter emergency rulemaking. An emergency rule is only effective for 120 days. This temporary delay would expire on October 29. This limits the Council in terms of what that delay could be. The Council would then need to also enter into permanent rulemaking and have public hearings. The public hearing meetings are scheduled in September in Spokane and October in Seattle. Again, this is the Council's decision. By our statute and in our bylaws, any decision affecting rulemaking takes eight votes, or the majority of all sitting Council members.

Sandra Adix, Asst. Attorney General (AAG) representing SBCC, drew the Council's attention back to the issue of what, if any, action the Council would like to take on the Governor's request. As Tim pointed out, that would necessitate the rulemaking process. The Council also needs to make a decision regarding waiver of the Sovereign Immunity issue in the lawsuit that's pending. What we are looking for is a Council decision on whether or not to waive the State's 11th amendment immunity and submit to Federal District Court Jurisdiction in the current pending BIAW and Code Council litigation. If passed, the Council would be asked to assist the Attorney General to seek and obtain whatever approvals are necessary within the Attorney General's office.

Motion #1

Mark Kulaas moved to provide direction to the AAG for the Building Code Council to request waiving the 11th Amendment State Sovereign immunity in the lawsuit brought in Federal Court against the Building Code Council. Dale Wentworth seconded the motion. The motion carried unanimously.

Motion #2

Mark Kulaas moved that legal counsel respond aggressively to litigation that has been brought to the Council. Angie Homola seconded the motion.

John asked for clarification. Mr. Kulaas responded that we will work within the timeframe required by the court.

Motion carried unanimously.

John asked Sandra to clarify what action is necessary. She explained that what is needed is a response to the Governor's request. The Council could allow the 2009 Energy Code go into effect on July 1 as is currently scheduled, or delay implementation along the lines of the Governor's request, or some variation of that request for delay.

John Chelminiak asked for clarification on the delay, and what actions the Council could take, specifically on the effect of the 120 day limit. He wondered whether or not separate motions

were needed and what the procedure would be since the current implementation date of July 1 is coming up very quickly. If the decision is made to delay for a period, what action would Council take to accomplish that? And what has to happen if Council wants to consider delaying beyond the 120 days (October 29). Sandra responded that Council would need to approve a motion directing SBCC staff to prepare and file a rulemaking order for an emergency rule, amending the 2009 Energy Code to delay the effective date of the code to a specific date in that range. It could not be effective for more than 120 days. Simultaneously, just as with other emergency rules, the Council would need to enter permanent rulemaking on this same issue. Staff would need to pursue regular rulemaking to adopt a permanent rule establishing an effective date for the 2009 Energy Code.

Motion #3

Tien Peng made a motion to direct staff to prepare and file a rulemaking order for an emergency rule amending the 2009 State Energy Code delaying the effective date of the Code to October 29, 2010, 120 days from July 1. John Chelminiak seconded the motion.

Angie Homola requested a discussion recognizing this delay was asked for by the Governor, to assist in economic recovery. In addition, Angie stands by the decision to move forward with an Energy Code that the Council worked very hard on in the interest of the long term stability of State. She recognizes this proposed delay is an interim measure to allow time to ease that transition.

John Cochran asked Sandra if she felt October 29 is a reasonable date to preparing for this. Sandra indicated that this is the maximum time and it is fine. Angie asked if the Council can extend the emergency rule at the end of the 120 days. Sandra replied it would be possible if the Council so desires.

John Chelminiak asked if Council could take a separate motion on that topic. He clarified that if it can't be delayed it any longer than October 29 he doesn't want to delay it. The Council is in a position where that's the likely outcome and he believes we ought to take care of that first and then decide what to do with the emergency rulemaking; it will just keep this before us for another couple of months. Sandra pointed out that the emergency rule waives public comment; regular rulemaking will allow for public input. John Chelminiak clarified the only way to allow public input is to extend beyond October 29, i.e. to open regular rule making. Angie asked if the Council reaches the 120 day mark under regular rulemaking and needs an extension, would opening this to regular rulemaking today automatically extend the emergency rule. Sandra explained it would not be automatic, but the Council would not be precluded from doing another emergency rule if regular rulemaking was not in force. John Chelminiak asked if a regular rulemaking has taken place by October 29 and a new rule exists will that then become the rule? Sandra explained, if it hasn't been completed by that point, then Council faces another decision, which is whether or not to enact another 120 period.

John Cochran commented there is a motion and a second in progress to delay enactment until October 29. John Chelminiak stated that in his mind it's the general welfare portion of the code that is the reason Council is taking this action and he believes we are doing this for the general welfare of the State and no other reasons.

Motion #3

Motion to delay code enactment made by Tien Peng and seconded by John Chelminiak, put on the table earlier, passed unanimously.

Motion #4

Ray Allshouse made a motion to direct staff to file for regular rulemaking to consider delay of implementation of the 2009 Energy Code to a date no later than April 1, 2011. David DeWitte seconded the motion.

Mark Kulaas stated his understanding was regular rulemaking will focus only on the date of rulemaking and not other substantive issues that the Council previously adopted in the rule. Sandra clarified that her understanding of the motion passed was to open permanent rulemaking on the issue of the implementation date and implementing no later than April 1, 2011. Mr. Allshouse agrees that was the intent of his motion; Mr. Kulaas reiterated, so that would provide a range of dates to be considered, but again it's not the substance of that, it is the issue of the implementation date.

Tim explains this is a proposed rule. Before the Council adopts, there will be a public hearing. He thinks that's the distinction between emergency rule and regular rule; Sandra confirmed this. Angie asked if the effect of this motion is that the Council will enter into regular rulemaking on the idea of delaying the implementation to no later than April 1. If the Council doesn't take any action on that rulemaking, the Energy Code goes into effect October 30. Sandra agreed. In the process of rulemaking, the Council can determine to extend the delay or not to extend the delay at all. Tim noted the 120 days of the emergency rule begins July 1. The effect of that is the 2006 Energy Code continues. Regular rulemaking gives the Council the opportunity to extend the date further, but no later than to April 1, 2011. Tim stated that currently public hearings are scheduled for September 10 and October 15. John Chelminiak asks if the Council took action at the October meeting, would there be enough time for filing prior to October 29? Tim replied yes, but the Council also has the option to extend the emergency rule.

Dave Peden asked if it would be possible to change the date for just the residential portion, as it appears that is where the concern lies. Tim stated that would create some problems inherent in separating the codes and would require significant revisions to the Energy Code.

John Chelminiak asks if portion of the Energy Code could be implemented. Sandra stated the only thing in the motion before the Council is the implementation date of the entire code. Dave Peden asked, if the Council could pursue parallel rulemaking, with another one looking at dividing out the residential from the commercial. Tim noted it could be done as a separate motion.

Motion #4

John Cochran reiterated the motion before the Council proceeding with regular rulemaking to extend the effective date no later than April 1 for the entire energy code. Motion carried unanimously.

Angie asked if at anytime during this regular rulemaking, the Council could have a divided rule separating residential and commercial; do we have the option to peel off part of it that might allow time to have a better understanding of the ramifications. Tim noted the need to make a decision today in order to adopt by December 1. If the Council doesn't enter rulemaking today, it would push it to another code cycle. He also noted technical issues will arise in separating out sections.

John asks Kristyn if it would be beneficial to separate out the residential portion of the code from the commercial code. A second question he asks is since the lawsuit is focused on Chapter 9, how easy would it be to simply separate or to not approve Chapter 9. Kristyn responded that she felt it would be. They felt it was fairly cut and dry to separate it out, if that was something the Council wanted to do.

Angie asked Kristyn whether or not the Council might be able to consider peeling out Chapter 9 from this continuation. It was her understanding that it would be complicated and convoluted to do that. She felt it would be preferable to keep the codes intact. She understood from going through this process last year that Chapter 9 did not stand alone and we didn't want to just take Chapter 9 and remove it. Kristyn felt it would require a revisit to the Code so it still went towards achieving the Governor's goal of a 30% decrease. Chapter 9 was proposed as an easier method of achieving that goal than pawing through and cleaning out tables. She stated she would hate to make that decision as a Council without some sort of an analysis. The Council relied on Chapter 9 to make certain concessions during the process and administratively someone would have to go through the entire code again and redo it as a package to achieve the Governor's goal.

Angie asked another question for clarification about time constraints and the practicality of revisiting code provisions. Tim noted the motion made and approved thus far only affects the implementation date.

Kristyn asked if combining the two issues, the Governor's letter and the lawsuit, was intended so the 120 days buys the Council time. Tim responded no, they are separate issues. The delay issue was addressed through an emergency rule and regular rulemaking. Now we are looking at potential changes to the code to address the litigation. There is also a suggestion that we could modify the delay so that it would only delay part of the Energy Code. Tim's recommendation to the Council is that it is a substantial change, and we are not prepared to file an alternative proposed rule coming out of this meeting. The Council could schedule another meeting between now and August 1 to address that specific issue of further amendments of the Energy Code. Kristyn liked the idea of being able to react to both the letter and the lawsuit through this rulemaking, but felt the time was inadequate.

John Cochran asked Sandra if the Council has provided adequate direction to her and her staff. Sandra responded in the affirmative.

Angie summarized the previous action as follows. Between now and October 29 deadline, the Council will meet on September 10 and October 15 for public hearings unless an additional meeting is scheduled. At those public hearings the Council will hear testimony with regard the

extension of the entire Energy Code. In order to visit the code in any detail, the Council would have to make a decision to reopen rulemaking, revisit Chapter 9, or all of the code. Sandra noted the Council would have to file what they want to adopt prior to taking of testimony, including the language the Council wanted to use.

John Chelminiak, stated his preference was to leave the issue where it is and continue on from what we have rather than opening further debate. He thinks the initial decision was the right decision.

Kristyn stated she wants to remove Chapter 9, as she wants to understand what that will do to the stringency of the code. The current legislation requires the Code to be 70% better in six code cycles. When you do the math, that means hitting a 15% to 20% mark each time to achieve that realistically. We need the increase in stringency from Chapter 9 to help move us towards to goal. We have to do much better every session.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:50 p.m.